FILE COPY

No. [redacted]74

Office-Supreme Court, U.S.
FILED
MAY 22 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,
Appellants,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

and

PACIFIC MOTOR TRUCKING CO. and
GENERAL MOTORS CORPORATION,
Appellees.

On Appeal from the United States District Court for the District of Columbia

---

JURISDICTIONAL STATEMENT

WALTER N. BIENEMAN
2150 Guardian Building
Detroit 26, Michigan

LARRY A. ESCKILSEN
1111 E Street, N. W.
Washington 4, D. C.

CHARLES W. SINGER
1825 Jefferson Place, N. W.
Washington, D. C.

PETER T. BEARDSLEY
1424 Sixteenth Street, N. W.
Washington, D. C.

Attorneys for Appellants

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

INDEX

CITATIONS

Cases

Statutes

No.

IN THE

Supreme Court of the United States

October Term, 1958

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,
Appellants,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

and

PACIFIC MOTOR TRUCKING CO. and
GENERAL MOTORS CORPORATION,
Appellees.

On Appeal from the United States District Court for the District of Columbia

---

JURISDICTIONAL STATEMENT

Appellants, American Trucking Associations, Inc., its Contract Carrier Conference, National Automobile Transporters Association, Convoy Company, Robertson Truck-A-Ways, Inc., Hadley Auto Transport, B & H Truckaway, Western Auto Transports, Inc., and Kenosha Auto Transport Corp., appeal from the judgment of the United States District Court for the District of Columbia, entered January 30, 1959, dismissing their complaint to set aside an order of the Interstate Commerce Commission, dated September 9, 1958, authorizing the performance of unrestricted motor carrier operations by Pacific Motor

Trucking Company, a wholly-owned subsidiary of Southern Pacific Company, a common carrier by railroad. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the District Court is reported at 170 F. Supp. 38 (adv. sheets). Copies of the opinion and judgment are attached hereto as Appendix A. A copy of the report and order of the Interstate Commerce Commission in *Pacific Motor Trucking Company Extension—Oregon*, 77 M.C.C. 605,[1] is attached hereto as Appendix B. A copy of the Commission's earlier report and order in the Sub. 34 case, 71 M.C.C. 561,[2] is attached hereto as Appendix C.

JURISDICTION

This suit was brought under 28 U.S.C. § 1336, to set aside an order of the Interstate Commerce Commission. The judgment of the District Court was entered on January 30, 1959, and notice of appeal was filed on March 27, 1959. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Sections 1253 and 2101(b) of the Judicial Code, 28 U.S.C. § 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on

---

[1] Embracing four consolidated cases docketed as Subs. Nos. 34, 35, 36, and 37. Although the principal caption of the Commission's report in the consolidated cases is Sub. 34, the great bulk of the authority granted arises from the Sub. 37 application. See Appendix B, *infra*, p. 80.

[2] The Commission's first report and order in the Sub. 34 case dealt only with the rail subsidiary's application for authority between Oakland, Calif., and points in Oregon on Southern Pacific's lines. Subsequently, the Commission granted reconsideration in the Sub. 34 case, and consolidated the four proceedings.

direct appeal in this case: *M. & M. Transportation Co.* v. *U. S.*, 350 U. S. 857, *Frozen Food Express, Inc.* v. *U. S.*, 351 U. S. 40, *American Trucking Associations, Inc., et al.* v. *Frisco Transportation Company*, 358 U. S. 133.

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding § 1, and Sections 5(2)(a) and (b), 207(a), 209(b), and 210 of the Interstate Commerce Act, 49 U.S.C. §§ 5 (2)(a) and (b), 307(a), 309(b), and 310, are set forth verbatim in Appendix D hereto.

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission, in the absence of "special circumstances" such as those disclosed in *American Trucking Associations, Inc., et al.* v. *U. S., et al.*, 355 U. S. 141, may authorize a railroad subsidiary to conduct completely unrestricted motor contract carrier operations to all points on its parent railroad's lines?

2. Whether the District Court correctly found the existence of "special circumstances" justifying the performance of unrestricted motor service by the rail subsidiary, such findings being directly contrary to those of the Commission itself?

3. Whether the Interstate Commerce Commission, without satisfying the requirements of, or observing the policy underlying, § 210 of the Interstate Commerce Act, may validly issue a contract carrier permit to a railroad's motor-carrier subsidiary under the following circumstances:

   a. Where the subsidiary also holds a common carrier certificate authorizing the transportation of closely-related commodities for the same shipper and receivers and within the same territory?

6. Where the parent company engages in transportation of the same commodities as a rail common carrier, for the same shipper and receivers, as well as competing automobile manufacturers and their dealers, within the same territory?

4. Whether the 1957 amendments to the provisions of the Interstate Commerce Act, Part II, dealing with motor contract carriers, were intended to alter the Congressional policy against rail entry into the motor carrier field?

5. Whether independent motor carriers, found by the Commission to be "authorized to conduct the proposed operations" and motor-carrier associations, all of whom were protestants before the Interstate Commerce Commission, have standing to bring suit to set aside its report and order authorizing unrestricted motor service by a rail subsidiary?

STATEMENT

Pacific Motor Tracking Company, hereinafter called PMT, is a wholly-owned subsidiary of Southern Pacific Company, a common carrier by railroad. It conducts widespread motor common carrier operations, largely restricted to so-called auxiliary and supplemental service.[3] Its present[4] contract carrier authority is limited to the transportation of new automobiles, new trucks and new buses (1) from Oakland, Calif., to Hawthorne, Carson City, and Minden, Nev., and points in Nevada which

[3] See Appendix B, p. 56, *infra*. The magnitude of PMT's present operations can be gauged somewhat by the fact that its certificate (Exhibit 30 in the Sub. 37 case before the Commission) consists of 78 sheets, and its 1956 gross revenue was over $29 million.

[4] Although the broad authority granted by the Commission in the proceedings under review has become effective by virtue of the refusal of the District Court to grant a temporary restraining order, we shall, for clarity, refer to its "present" authority as that existing prior to the instant grant.

are stations on the lines of its rail parent, (2) from Raymer, Calif., to points in the Los Angeles Harbor commercial zone, and (3) between Los Angeles and Calexico and San Ysidro, Calif.[5]

By applications filed on various dates, PMT sought authorization to provide unrestricted motor contract carrier service as a transporter of new automobiles, new trucks and new buses, from and to the points shown:

Sub. No.	Date Filed	Origin	Destination
34	10/14/55	Oakland, Calif.	Points in Oregon which are stations on the lines of PMT's rail parent.
35	3/5/56	Oakland, Calif.	Austin, Tonopah, and Yerington, Nev.
36	3/9/56	Raymer, Calif.	Points in Arizona which are stations on the lines of PMT's rail parent.
37	10/23/56	Oakland, Calif.	Points in Ariz., Idaho, Nev., N. M., Ore., Utah, and Wash.
		Raymer, Calif.	Points in Ariz., Idaho, Nev., N. M., Ore., Utah, and Wash., with specified exceptions.
		South Gate, Calif.	Points in Ariz., Idaho, Mont., Nev., Ore., Utah and Wash.

In the Sub. 34 and 35 cases, a Joint Board and examiner, after hearings, recommended that PMT's applications be granted, but the Commission, division 1, stayed the taking effect of the recommended orders pending further order of the Commission. In the Sub. 36 and 37 cases, a joint board and examiner recommended that the applications be granted. While the latter two cases were pending on exceptions before the Commission, it issued its first report and order in the Sub. 34 case, approving

[5] See Appendix B, p. 56, *infra*. Its applications to secure these contract carrier rights were unopposed before the Commission.

the relatively limited authority sought. Upon petition, the Commission granted reconsideration in the Sub. 34 case and consolidated all four proceedings for disposition in one report. By its report and order dated September 9, 1958, the Commission authorized PMT to perform unrestricted motor contract carriage of automobiles and trucks as set forth in the appendix thereto. (See Appendix B, *infra*, p. 80) Undoubtedly, appellees will quarrel with our description of the service authorized as being "unrestricted" since the Commission, in each case, limited the service to points on the lines of PMT's rail parent. This limitation, while of considerable comfort to the rail protestants, since it prevented Southern Pacific from "invading" their territory, affords no solace whatever to the independent motor carrier protestants. Their contention regarding this facet of the case is well reflected by Commissioner Murphy, dissenting, Appendix B, *infra*, p. 78:

> * * * This limitation merely defines the territorial scope of this grant of unrestricted motor-carrier authority and is actually of little real substance since it will permit the applicant to provide service at a majority of the important traffic centers in the destination territory involved. To these points the service authorized will be wholly unrestricted and if such a grant is proper, simple logic requires a similar grant to off-line points sought by the applicant. The fact of the matter is, however, that a grant of unrestricted authority, regardless of its extent, is not justified on this record.

THE QUESTIONS ARE SUBSTANTIAL

This proceeding involves the first instance in which the Commission has authorized the performance of substantial motor contract carrier operations by a railroad or its affiliate. The Commission's decision, buttressed by the opinion of the court below, unless reversed, will serve as a precedent for determination of all future contract

carrier applications by railroads and as a basis for their further entry into the field of unlimited truck service. The basic issue is the power of the Interstate Commerce Commission to authorize the performance of unrestricted motor-carrier service by a railroad subsidiary, in the absence of any special circumstances justifying such a grant of authority, and indeed, in the teeth of a finding by the Commission majority[6] that the record before it reflected "the absence of any showing of unusual conditions in these proceedings." Appendix B, p. 71, *infra*.

The District Court's finding, directly contrary to that of the Commission, that there was "substantial evidence of special circumstances" justifying the grant of authority to PMT (Appendix A, p. 34, *infra*) is based, in part, upon a misreading of the Commission's report. Thus, the Court held "that the Commission found that * * * use of any other carrier [than PMT]" would cause confusion and disarrange "operations at the plant, which are geared to use of PMT's services from its nearby yard." (Appendix A, p. 34, *infra*). The Court thus attributed to the Commission a finding which it did not make. The language of the Commission's report to which the Court referred is nothing more than a recitation of the contentions of the applicant and its supporting shipper and in no sense a finding of the Commission (Appendix B, p. 58, *infra*). The actual finding of the Commission on this point (*Ibid.*, p. 66) shows a total disagreement with the contentions of PMT and its supporting shipper, General Motors, and demonstrates the error of the District Court in attributing to the Commission the "finding" referred to:

---

[6] The vote to authorize PMT to conduct unrestricted motor carrier service was five to four, with two Commissioners (Minor and Goff) not participating. Although Commissioner Walrath was absent and did not participate, his statement, Appendix B, p. 79, *infra*, clearly indicates that for all practical purposes he may be counted as dissenting.

> * * * The fact that both General Motors and applicant have cooperated to permit the latter to establish receiving yards adjoining the former's assembly plants and thereby to block the use by other carriers of normal egress routes, *has no bearing upon the adequacy or inadequacy of existing motor transportation facilities.*[7] (Empnasis supplied)

The court below also held (App. A, p. 34, *infra*) that other, routine, findings of the Commission, although not considered by it to constitute "unusual conditions" did, "in the court's opinion," constitute "special circumstances" justifying the authority sought. In the same portion of its opinion, the court states that "the order further shows that denial of the permit would cause substantial damage to the applicant, PMT." We can locate no such finding in the Commission's report. Indeed, its statement (App. B, p. 66, *infra*) that "it [is] unlikely that a significant amount of freight would be diverted from the Southern Pacific to its motor contract carrier subsidiary if the proposed service were limited to Southern Pacific points," directly refutes the court's statement. In short, since the Southern Pacific system would, in any event, retain the GM traffic to points on its lines, the mere fact that it would move in the parent railroad's cars, rather than its subsidiary's trucks, can hardly result in damage to PMT. In any event, it is clear that the court below, in finding "special circumstances" overruled the Commission's contrary holding that none existed. We respectfully submit that the court erred in so doing since its opinion nowhere discloses wherein the Commission's finding of "an absence of any showing of unusual conditions" was clearly erroneous.

---

[7] Thus, in these proceedings the Commission, while acknowledging that PMT had failed to demonstrate that the services of existing independent motor carriers were in any way inadequate, a factor which it has consistently relied on in other application cases as grounds for denial of new authority, nevertheless went on to bestow favored treatment upon the rail subsidiary despite the important Congressional policy involved.

Also involved here is the question of whether the Commission must conform its administration in this field to the decisions of this Court or whether it is free to merely pay lip service to them, while substantively ignoring them. The Commission's action here complained of follows by less than a year this Court's decision in *American Trucking Assn's., Inc.* v. *U. S.*, 355 U. S. 141, hereinafter called the *A.T.A.* case. Although the Court there upheld the Commission's award of unrestricted truck authority to a rail subsidiary, we read its opinion as clearly restricting such grants to situations in which "special circumstances," justifying a departure from the Congressional policy against such grants, are shown to exist. The Commission's majority noted, in passing, that this Court in the *A.T.A.* case stated that "the underlying policy of section 5(2)(b) must not be divorced" from § 207 proceedings[8] and that "the Commission must take 'cognizance' of the National Transportation Policy and apply to Act 'as a whole.'" While it claimed to follow this mandate (Appendix B, p. 69, *infra*), appellants submit that the report, in substance, ignores both the Congressional policy and this Court's clear enunciation of the Commission's obligation set forth in the *A.T.A.* case, *supra.*

This Court's opinion in the *A.T.A.* case contains (355 U. S. 152) the following significant statement:

> Finally, if under our interpretation a "loophole" exists in the Act, the Commission has shown no inclination to permit its use as such. Should the Commission prove to be less stringent in the future, appellants not only have recourse to the Congress, but also to the courts for review of the Commission's finding that "special circumstances" exist.

---

[8] The Commission's report also holds, we think correctly, that the same principle applies where, as here, a contract carrier permit is sought by the rail subsidiary under § 209. Appendix B, p. 69, *infra.*

The above-quoted statement shows beyond peradventure that a finding by the Commission that "special circumstances" justify its action is a *sine qua non* to any grant by it of unrestricted motor rights to a railroad or its affiliate. Yet here, as stated, the Commission's report not only fails to find "special circumstances" but, indeed, contains an exactly contrary finding.

1. The National Transportation Policy provides for the preservation of the inherent advantages of each form of transportation. In *U. S.* v. *Rock Island Motor Transit Co.*, 340 U. S. 419, 427, this Court noted with approval the Commission's application of the Policy "so as to read the proviso [of § 5(2)(b)] into § 207 in order to preserve the inherent advantages of motor carrier service." The proviso, of course, requires that the Commission not allow railroads or rail affiliates to purchase motor operating rights except upon a finding, among others, that the transaction will enable the purchaser "to use service by motor vehicle to public advantage *in its* [rail] *operations.*" The emphasized phrase has been translated by the Commission as empowering it to authorize so-called auxiliary and supplemental motor operations by railroads, but not, as here, all-out truck service, competitive with that of independent motor carriers and indeed, that of the railroads themselves. The one exception to the rule that the Commission may not authorize the performance of unrestricted truck service by railroads or their affiliates is contained in this Court's decision in the *A.T.A.* case, *supra*, upholding an I.C.C. grant of unrestricted truck service to a rail subsidiary, based upon—to use the Court's words—"special circumstances"[9] there found to exist. The special circumstances of that case—failure of independent motor carriers to supply adequate service to the small Iowa communities involved, 355 U. S., at 153—find no parallel in the record before the Commis-

[9] 355 U. S. 141, at 152.

sion here. Indeed, the one thing on which the Commission's majority and dissenters seem agreed upon is that such circumstances do not exist here. The Commission majority acknowledged that PMT failed to show any "unusual conditions," a finding concurred in by the dissenting Commissioners.[10] The protestant motor carriers in this case—far from being unwilling—are most anxious to serve the supporting shipper, General Motors Corporation. They are prevented from doing so, as noted by Commissioner Murphy (Appendix B, p. 77, *infra*), only by the "adamant refusal" of General Motors to use their services. The report under consideration (Appendix B, p. 58, *infra*) states:

> Exceptants are authorized to conduct the proposed operations, have equipment suitable for the transportation of the shipper's vehicles, and are experienced in transporting the considered commodities.

Thus, despite a failure to find exceptional circumstances which would justify a grant of unrestricted motor authority to a railroad and despite the above-quoted finding which concedes that the protestant motor carriers are fit, willing and able to provide any service needed, the Commission allows a wholesale invasion of the motor carrier field by the rail subsidiary.[11] Why? Its only apparent justification for its extraordinary action is that "insofar as Southern Pacific points are concerned, the authority sought represents no more than a request by the Southern Pacific to perform truck transportation, albeit contract-carrier transportation, to the same points it serves as a rail carrier * * *." Appendix B, p. 67.

---

[10] Appendix B, p. 71, 76, and 77, infra.

[11] Commissioner Arpaia, dissenting (Appendix B, p. 76, *infra*) sums up the matter accurately: "In essence, the majority has not only failed to follow the Congressional policy but has misapplied the Congressional mandate. It has protected rail protestants against invasion and competition yet has failed to extend protection to the motor-carrier protestants."

infra. This reasoning is logically and legally fallacious, in view of the fundamental Congressional policy involved. If PMT is to be turned loose to perform all-out truck service, competitive both with independent motor carriers and its own rail parent, merely because the latter already transports the same traffic in rail service, then every railroad throughout the land is free to acquire similar motor authority to transport its choicest traffic for its largest shippers. Thus, the Congressional policy against unrestricted truck operations by railroads has been here downgraded by the Commission to an exercise in semantics! The Commission's action here overrules, *sub silentio*, its landmark *Barker* decision, *Pennsylvania Truck Lines, Inc.—Control—Barker*, 1 M.C.C. 101, decided October 8, 1936, holding (at p. 111) that Congress intended that railroad truck operations be restricted to service auxiliary to, rather than competitive with, rail service, and followed through the years in a long line of cases involving both § 5 and § 207 of the Act.

2. In addition to its failure to conform to Congressional policy and the decisions of this Court respecting rail entry into the field of unrestricted truck service, the Commission's report and order fails to carry out the Congressional policy evidenced by Section 210 of the Interstate Commerce Act. These provisions were designed to prevent carriers "from conducting operations as both a common and contract carrier, when the operations would be competitive as to commodities and territory." *Ziffrin, Inc. Contract Carrier Application*, 28 M.C.C. 683, 696. "The discrimination which the section is intended to obviate is always present when the same persons are able to offer both kinds of service in respect of the same commodities and between the same points." *Ibid.*, p. 698. The Commission's denial of dual authority in the cited case was upheld in *Ziffrin, Inc.* v. *U. S.*, 318 U. S. 73. The Commission's failure to require PMT to satisfy the requirements of § 210 is particularly glaring in view

of its criticism, in its first report in the Sub. 34 case, of PMT's reliance upon the fact that it had previously conducted dual operations without being charged "with any of the practices which section 210 is designed to prohibit." Said the Commission (Appendix C, p. 87, *infra*):

> Applicant's plea * * * is without merit. Each successive grant of common- or contract-carrier authority which would result in dual operations must, under the statute, be accompanied by a finding that such resultant dual operations will be consistent with the public interest and the national transportation policy. Each such finding must be based upon the circumstances existing at the time the particular grant is made, and each case must be decided on its own merits.

The same report also noted (Appendix C, p. 85, *infra*) that "even without the statutory requirements we would be remiss in our duty were we to ignore the dual relationship between applicant, as a contract carrier by motor vehicle, and the Southern Pacific Company, as a common carrier by rail."

Having thus been admonished, in the first Sub. 34 case, that the statute required introduction of evidence in future proceedings to satisfy the policy underlying Section 210, PMT, in the far broader Sub. 37 proceeding, presented no evidence whatever to support a finding that its dual operations would be conducted "consistently with the public interest and with the national transportation policy . . ." Instead, it merely relied upon the fact that it had conducted such operations in the past. The Commission's majority excuses this flagrant omission by PMT, and attempts to avoid the stricture of § 210, by restricting the rail subsidiary's common carrier certificates against the transportation of automobiles and trucks. This action, we submit, by no means cures the evil at which § 210 was aimed, and we can find no better language to make the point than that of Commissioner Murphy, dissenting (Appendix B, p. 79, *infra*):

> * * * In numerous cases, we have held that the mere opportunity for indulging in the unfair or discriminatory practices contemplated by section 210 is sufficient to bar approval of dual operations. It would be difficult to visualize a situation in which more opportunity for such practices would be present than in the instant case in which a single shipper will be served by applicant in its dual capacity as a common carrier of general freight and a contract carrier of automobiles and trucks and by the Southern Pacific as a common carrier by railroad. 'The applicant has wholly failed to show good cause for approval of the dual operations here involved, and the granting of approval under the circumstances of these cases establishes a precedent that will totally destroy the future effectiveness of section 210.[12]

3. The District Court, in upholding the Commission's award of unrestricted motor-carrier authority to the rail subsidiary, erred in its interpretation of the purpose of the recent amendments to Sections 203(a)(15) and 209 (b) of the Interstate Commerce Act. The purpose of the legislation, enacted as Public Law 85-163, 85th Cong., approved August 22, 1957, was to overcome this Court's decision in *U. S.* v. *Contract Steel Carriers, Inc.*, 350 U. S. 409, holding (p. 412) that a contract carrier "is free to aggressively search for new business within the limits of his license." The testimony of Commissioner Clarke before the Subcommittee of the Senate Committee on Interstate and Foreign Commerce, makes this clear. The Commissioner noted that "[f]reedom to solicit customers without restriction would tend to obliterate the distinction which Congress intended to make between common and contract carriers" and that enactment of the legis-

[12] The opportunity for practices which § 210 was designed to prevent is even greater than set forth by Commissioner Murphy. In addition to the dual service by PMT and its rail parent which he refers to, the record before the Commission shows that the railroad also serves General Motors' competitors in the automobile manufacturing field in the same general area.

lation would make clear ". . . that the transportation services furnished by such [contract] carriers are to be of a special and individual nature for one or a limited number of persons and which are not provided by common carriers." Hearings, p. 23. A representative of the railroad industry stated that the legislation was needed to prevent ". . . the unregulated, unbridled growth of highly competitive contract carriage . . ." *Ibid*, p. 267. This testimony and the reports of the respective committees (S. Rept. No. 703, H. Rept. No. 970, 85th Cong., 1st Sess.) establish that the purpose of the legislation was to restrict the business field of contract carriage. Certainly nothing in the amendments was in any way intended to alter the traditional Congressional policy against rail performance of unrestricted truck service. Thus that policy continues to apply to applications by railroads or their affiliates to perform motor contract carriage as well as motor common carriage.[13] But the court below, while conceding that the Commission had not imposed the restrictions generally imposed in motor common carrier grants to railroads "in the absence of special circumstances" (Appendix A, p. 37, *infra*) nevertheless went on to uphold the Commission's order on the ground that the authority granted was "restricted in many respects." Other than the futile limitation of PMT's common carrier certificates against transportation of the considered commodities—futile because of General Motors' oft-announced policy of using only contract carriage—the sole "restriction" imposed by the Commission was the limitation of service to points on the parent railroad's lines. This is a restriction in the most technical

[13] The District Court seems to find fault with the fact that most of the cases we cited to support this proposition "deal with orders under § 5(2)(b) or § 207 and administrative practice in interpreting and applying those sections." Appendix A, p. 38, *infra*. This is hardly surprising in view of the fact that the case under review involves the only instance so far of wholesale rail invasion of the truck field through the medium of contract carriage.

sense only, since no carrier of the commodities here involved is authorized to serve all points throughout the country. Bearing in mind the vast scope of the Southern Pacific rail system, it seems almost absurd to refer to a condition which limits service "only" to points thereon as a "restriction." In any event, neither the Commission, the intervening defendants, nor the court below contend that this so-called restriction limits PMT to the performance of auxiliary and supplemental service. The acceptance of the imposition by the Commission of this condition as compliance with its obligation under the Congressional policy involved, reduces that policy to the status of an empty gesture, and in addition, converts it from its true purpose, i.e., the protection of the independent motor carrier industry from invasion by unrestricted truck service conducted by railroads, to a policy devoted to protecting railroads from the invasion of their territory by other railroads. The court below took pains to point out that the Commission had complied with the provisions of amended § 209(b) in issuing the grant to PMT. Appendix A, p. 33, *et seq.*, *infra*. While this might have been enough, had the applicant been other than a rail subsidiary, the court's decision fails to give appropriate consideration to that all-important fact and, by indirection, seems to have concluded that the amendments to the law somehow placed a motor-contract carrier application by a rail affiliate in a different light than its application to perform motor common carriage. Indeed, if there is to be any distinction, it should be that a rail affiliate cannot perform *any* contract carriage. The Transportation Act of 1887 was designed to cure many evils in the nation's rail transport system. A paramount purpose was to eliminate discriminatory rates resulting from private contracts with powerful shipping interests. To effect fair and impartial treatment of all shippers, Congress limited railroads to the performance of common carrier service. Then, by the Motor Carrier

Act, 1935, Congress allowed rail entry into motor transportation only to the extent that such operations would be used "in its [rail] service." With the noted exception of "special circumstances," it has been consistently held that this restricts such motor operations to those which are an adjunct to rail service. Thus, the limitation prohibits railroad-controlled or affiliated motor carriers from engaging in operations beyond the scope of the railroads' operations. As railroads cannot perform contract carriage, it should follow that their motor subsidiaries cannot do so either.

4. The holding of a majority of the court below that plaintiffs lack standing to sue, is, we submit, clearly erroneous.[14] This holding stems from the fact that General Motors indicated that no matter what the outcome of the proceeding before the Commission, none of the protestant motor carriers would be given any of its business. It follows, say the intervening defendants, "that there is an absence of proof that the motor carrier plaintiffs have suffered or are threatened with damage or financial injury," and thus they lack standing to sue. Appendix A, p. 39, *infra*. This novel theory, adopted by the majority of the court below, has interesting and dangerous implications. It simply means that any applicant before the Commission may successfully preclude the possibility of court review, provided only that he can prevail upon his supporting shipper or shippers to announce, a la General Motors here, that come what may, no protesting carrier will get any of its business. Thus, the majority below would deprive the plaintiff carriers of the opportunity to test in the courts the Commission's application of the provisions of the law expressly intended to prevent encroachment by railroads in the truck

[14] As noted by the court, Appendix A, p. 40, *infra*, this issue was not raised by the Commission but by the intervening defendants, PMT and General Motors Corp.

field. What the majority has done, then, is to hold that Congress has created a right without a remedy.[15] An example of the absurd results which follow from the majority's holding comes readily to mind. In the Commission's day to day administration of the law, it is constantly faced with applications to serve newly constructed plants. Does it follow, since no traffic has theretofore issued from such a plant, that a Commission order granting authority to one carrier but not another is immune from judicial review at the instance of the latter merely because the supporting shipper had stated that he would get none of his business in any event? The decision of the majority of the court below on this phase of the case gives to the current utterances of supporting shipper witnesses the same dignity as the ancient Medean law. Whatever else might be said, there is no reason, legally or factually, to assume that even General Motors might not change its mind. That this is possible was conceded even by its staunch ally, PMT, when it said:

> * * * Furthermore, there is nothing in this decision which would prevent General Motors, if it ever became dissatisfied with the service of Southern Pacific and PMT, from turning over this traffic to other available carriers, rail or motor, *including plaintiffs*. (Emphasis supplied)[16]

The cases cited by the majority below as supporting its conclusion will be seen, on analysis, to fall far short of so doing. *Atchison, T. & S. F. Ry. Co. v. U. S.*, 130 F. Supp. 76, affirmed *per curiam*, 350 U. S. 892, merely held that *rail protestants* before the Commission lacked standing to bring suit to contest its order approving a

[15] The applicable provisions of the Interstate Commerce Act and the National Transportation Policy are not self-enforcing. If parties such as the protestant motor carriers before the Commission may not bring court action to test the validity of its decisions, then who can?

[16] PMT's brief before the District Court, p. 24.

merger of *motor carrier* applicants. If the motor protestants before the Commission here had been seeking to block a merger of Southern Pacific with another railroad, the cited case would be in point. The other case, *Pittsburgh & W. Va. Ry. Co.* v. *U. S.* 281 U. S. 479, held only that one railroad, a minority stockholder in another road whose applications to abandon its station and use union terminal facilities in the same city had been approved by the Commission, had no standing to sue, in a three-judge court, to set aside the Commission's order. Said the Court (281 U. S. 487):

> • • • This financial interest [as a minority stockholder] does not differ from that of every investor in Wheeling securities or from an investor's interest in any business transaction or lawsuit of his corporation. Unlike orders entered in cases of reorganization, and in some cases of acquisition of control of one carrier by another, [footnote citing cases omitted] the order under attack does not deal with the interests of investors.

If one of the protestants before the Commission here had been a stockholder of Southern Pacific who claimed that its venture, through PMT, into the field of motor contract carriage would cause it to lose money, the cited case would support the proposition that such stockholder lacked standing to sue to set aside the Commission's order. But the dissimilarities, both as to the status of the parties plaintiff and the issues involved, are so obvious that we submit the cited case in no way supports the holding of the majority below that plaintiffs had no standing to bring suit for review of the Commission's order.

CONCLUSION

The questions presented by this appeal are substantial and of public importance. For the reasons stated, it is urged that jurisdiction be noted and that the judgment of the District Court be reversed and the case remanded to that court for disposition consistent with this Court's opinion.

Respectfully submitted,

WALTER N. BIENEMAN
2150 Guardian Building
Detroit 26, Michigan

LARRY A. ESCKILSEN
1111 E Street, N. W.
Washington 4, D. C.

CHARLES W. SINGER
1825 Jefferson Place, N. W.
Washington, D. C.

PETER T. BEARDSLEY
1424 Sixteenth Street, N. W.
Washington, D. C.
Attorneys for Appellants

CERTIFICATE OF SERVICE

I, Peter T. Beardsley, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the twenty-second day of May, 1959, I served copies of the foregoing document on the several parties thereto, as follows:

1. On the United States, by mailing copies, in duly addressed envelopes, with postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D. C., and Willard R. Memler, Esq., Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing copies in duly addressed envelopes, with postage prepaid, to Robert W. Ginnane, Esq., General Counsel, and James Y. Piper, Esq., Assistant General Counsel, at the offices of the Commission, Washington 25, D. C.

3. On Pacific Motor Trucking Co., intervening defendant, by mailing copies in duly addressed envelopes, with airmail postage prepaid, to Robert L. Pierce and William E. Meinhold, Esqs., 65 Market Street, San Francisco 5, California, and with postage prepaid, to Edward M. Reidy and Thormund A. Miller, Esqs., 205 Transportation Bldg., Washington 6, D. C.

4. On General Motors Corporation, intervening defendant, by mailing copies in duly addressed envelopes, with airmail postage prepaid, to Henry M. Hogan and Walter R. Frizzell, Esqs., 3044 West Grand Blvd., Detroit 2, Mich., and with postage prepaid, to Beverley S. Simms, Esq., 612 Barr Bldg., 910 17th Street, N. W., Washington 6, D. C.

PETER T. BEARDSLEY